

OHIO STATE LAW JOURNAL

Volume 50, Number 4, 1989

The Influence of History on Procedure: Volumes of Logic, Scant Pages of History

LINDA S. MULLENIX*

A few words should be said about historical research in procedure. Few words, indeed, are necessary, for there isn't much to talk about.¹

I. INTRODUCTION

Many civil procedure teachers who pause to contemplate pre-1938 procedure are not unlike fifteenth-century sailors who contemplated a voyage across the seas. There is this palpable but nonetheless terrifying sense of coming to the very edge of the known universe, a point beyond which, as all sage souls realize, one falls into a dark, abysmal void. And so, not unlike most happy fifteenth-century sailors, many procedure teachers are quite content to hug the safe and familiar shores of the known procedural map. Thus, not a few academicians have the same sense of pre-Federal Rules procedure that ancient sailors had of the Indian subcontinent: as something distant, substantial, ancient, quaint, and vague. And not unlike medieval tales of exotic lands, pre-1938 procedural history has assumed elements of myth, allegory, and uncertain lore, as the safe sailors repeat what little they have heard from fellow travellers like themselves.

This Article is, for lack of a better word, a rumination on the importance of being historical for proceduralists. So self-evident a proposition seems embarrassing to assert; yet it is a concept now so much out of vogue, so academically *déclassé*, as to require reaffirmation. How it is that history and its enthusiasts have suffered such shabby patronization is no doubt an interesting subject in itself,² but it is an inquiry beyond the intellectual compass of this more modest essay.

History is important to proceduralists for reasons that are both obvious and subtle. The Federal Rules of Civil Procedure, accomplishing the merger of law and equity, require some knowledge and understanding of those two antecedent systems. The rulemaking history of the Federal Rules is important for understanding the basis and nature of rule reform, including the problems that required remedial solution and

* Judicial Fellow, 1989-90 (The Federal Judicial Center); Associate Professor of Law, Catholic University of America Law School (on leave); B.A. 1971, City College of New York; M.Phil. 1974, Ph.D. 1977, Columbia University; J.D. 1980, Georgetown University Law Center. The views expressed are solely the author's and not those of any institutional affiliation. The Catholic University of America Law School provided summer financial research support for this writing project.

1. G. HAZARD, JR., *RESEARCH IN CIVIL PROCEDURE* 114 (1963) [hereinafter HAZARD].

2. For a recent lengthy jeremiad on the decline of classical intellectual pursuits in American education, see A. BLOOM, *THE CLOSING OF THE AMERICAN MIND* (1987).

the thinking that went into rule amendment and revision. Certain procedural questions such as the right to trial by jury, interlocutory appeal, and alternative remedies require historical knowledge to apply the rules themselves.

But beyond the very apparent utilitarian uses of history in procedure, historical understanding is important for other reasons. Doctrinal history of procedural problems assists in broadening contemporary understanding of procedure. Thus, the current debate over individual versus aggregate procedure is enriched by research that suggests that theories of aggregate procedural justice are both ancient and not unusual. Research into the history of personal jurisdiction provides bases for understanding the juridical relationship between the individual and the state that are independent of modern due process concepts. Historical research into the merger of law and equity has focused attention on the primacy of equitable solutions to procedural issues, suggesting further debate concerning the consequences of this historical evolution.

Furthermore, for the procedure teacher, pedagogical responsibilities require not only knowledge of procedural history, but transmission of that history to students at an early stage in their legal education. Unless the procedure teacher undertakes to impart some historical content to issues and problems, the law student is unlikely to acquire this basic historical framework except in a discrete course in legal history or jurisprudence. Thus, the procedure teacher has the burden of setting the stage for the law student's broader encounters with the law. Much of the substantive law that first year students examine is imbued with procedural implications; the procedure teacher carries the heavy responsibility of placing both substance and procedure in a historical context that suggests the richness, value, and importance of that history.

This Article explores the influence of history on procedure and the efforts that procedural scholars are making to impart some historical dimension to writing on procedural topics. Part Two outlines the views of other proceduralists on the importance of historical understanding. Part Three revisits a twenty-five year-old study by Professor Hazard on the state of civil procedure scholarship. That study found little historical research being done on procedural issues, and it provides the framework for an assessment of contemporary efforts in research on the history of procedure, contained in Part Four. Part Five briefly discusses the major contemporary challenge raised by metaproceduralists to the historical, traditional approach to civil procedure. Finally, the Article concludes with some observations on the fine work currently being done in historical research on procedure and the opportunities for continued projects.

II. THE IMPORTANCE OF BEING HISTORICAL FOR PROCEDURALISTS

The immediate impetus for this essay is the publication of the second edition of Professors Casad,³ Fink,⁴ and Simon's⁵ casebook on civil procedure.⁶ While the

3. John H. and John M. Kane Professor of Law, University of Kansas School of Law.

4. Isadore and Ida Topper Professor of Law, The Ohio State University College of Law.

5. Associate Professor of Law, University of Colorado School of Law.

6. R. CASAD, H. FINK & P. SIMON, *CIVIL PROCEDURE: CASES AND MATERIALS* (2d ed. 1989) [hereinafter CASAD, FINK & SIMON].

lieutenants and foot soldiers of civil procedure march determinatively on two flanks,⁷ Professors Casad, Fink, and Simon doggedly advance (or perhaps retreat is the more apt concept) according to their own conception of the field. Aware of the skirmishes surrounding them, the authors (Professors Casad and Simon in the first edition;⁸ Professors Casad, Fink, and Simon in the second) have marched straight ahead with their particular vision and commitment to procedural education.

The authors' conception is one that is highly traditional, doctrinal, and above all else, historical. Their text represents an abiding and unapologetic belief in the importance of history for the knowledge and, more importantly, the understanding of procedure. If, as it has been claimed,⁹ so-called traditional procedure has lost academic respectability and is in its death throes, then this text stands as a challenge to that view. This casebook is, in a very pointed sense, a deliberate anachronism.

Professors Casad and Simon acknowledged this in their first edition, when they very modestly stated: "It is our belief that some aspects of civil procedure can best be understood—indeed, some can only be understood—as results of a historical process. This way of approaching the subject has not been very fashionable in recent years"¹⁰ Now, in the second edition, not only have the authors added new, additional historical materials,¹¹ but they have become more assertive in the apparent unorthodoxy of their orthodoxy:

[W]e again take the position that the civil procedure course, perhaps more than any other basic law school course, is history-driven. Students cannot understand certain concepts, such as the right to jury trial, or the remedy of an injunction against the operation of a state statute in a civil rights action, without knowledge of the development of separate courts of law and equity in England prior to the American Revolution. Moreover, without a historical dimension, the rules of practice that are taught seem to be self-evident and not easily subject to change. Rather, we believe that students should come to see the cyclical nature of procedural development—reform, followed by reaction, followed by further reform.¹²

Professors Casad, Fink, and Simon clearly believe that the educated lawyer is incomplete without this grounding in historical procedure¹³ and that mere rote

7. See, e.g., Mullenix, *God, Metaprocedure, and Metarealism at Yale*, 87 MICH. L. REV. 1139 (1989) [hereinafter Mullenix, *Metaprocedure*] (reviewing the Cover, Fiss, and Resnik casebook *Procedure*); Mullenix, *User Friendly Civil Procedure: Pragmatic Proceduralism Slouching Away from Process Theory*, 56 FORDHAM L. REV. 1023 (1988) (reviewing the Crump, Dorsaneo, Chase, and Perschbacher text, *Cases and Materials on Civil Procedure*).

8. R. CASAD & P. SIMON, *CIVIL PROCEDURE: CASES AND MATERIALS* (1st ed. 1984) [hereinafter CASAD & SIMON].

9. See, e.g., Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 LAW & HIST. REV. 311 (1988) [hereinafter Subrin, *David Dudley Field*]; W. Eskridge, Remarks at the AALS Conference on Civil Procedure (June 5, 1988). Writes Professor Subrin: "The present espousal of such devices as case management and alternative dispute resolution is both a sign of and a reaction to a procedural regime that is in question and in decline, if not in its death throes." Subrin, *David Dudley Field*, *supra*, at 311. See also Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494 (1986) (same hypothesis). Although Professor Subrin's remark is addressed to applied adjudicative procedure, this basic attitude about the efficacy of post-1938 federal procedure is mirrored in a similar decline in faith concerning teaching the so-called traditional canon of civil procedure. Indeed, the Cover, Fiss, and Resnik casebook *Procedure* represents a kind of failing faith in that traditional canon. See R. COVER, O. FISS & J. RESNIK, *PROCEDURE* (1988) [hereinafter COVER, FISS & RESNIK].

10. CASAD & SIMON *supra* note 8, at vii.

11. See, e.g., CASAD, FINK & SIMON, *supra* note 6, at 399–430. This 31-page historical section on the background of modern pleading represents a 25-page expansion over the first edition.

12. *Id.* at ix.

13. At the very practical level, the authors make the argument that through studying historical materials students

knowledge of rules, while adequate, is intellectually shallow. Professor Subrin, another proponent of the importance of history for proceduralists, has asserted additional reasons for more careful study of the past.¹⁴ He suggests that through studying history, we can "help dispel three different but connected misconceptions about civil procedure."¹⁵

The first mistaken notion is the idea that "rules simply arrived, impelled by neither people nor ideology."¹⁶ Professor Subrin, perhaps himself driven by a twentieth-century realist comprehension of the law, would have us understand the sociopolitical context and the competing agendas that give rise to rule reform and revision. The second misconception is that the Federal Rules of Civil Procedure are a logical extension of the Field Code, the nineteenth-century attempt at procedural rule reform in New York State. This mischaracterization, when unthinkingly repeated by classroom teachers, induces incorrect conclusions about the modern rules.¹⁷ The third mistaken notion is that nineteenth-century procedure, viewed as overly rigid and formalistic, has "nothing to offer the current procedural dialogue."¹⁸ Historical proceduralists flatly deny this proposition, and like Professors Casad and his coauthors, Professor Subrin makes the point that "[h]istory also aids our recognition of the apparent intractability of recurrent themes and tensions."¹⁹ Thus, he says that "before embarking on new . . . paths, we need to reflect upon our procedural ancestry in some detail,"²⁰ a sentiment that embodies and reflects Santayana's cautionary epigram.²¹

Perhaps the most eloquent affirmation of the importance of history for proceduralists was stated by Professor Hazard some twenty-five years ago in his benchmark study of research in civil procedure.²² That unsparing report, which succinctly noted the dearth of historical research on procedure, perhaps perfectly captured the routine lip service that academicians to this day condescendingly pay to historical research efforts: "It is commonplace to make obeisance to the uses of the

"should also be alert to the current issues and trends in procedural thinking, and the future questions with which they will have to deal as members of the bar, in their bar associations, and as members of law reform commissions, legislatures and the bench." *Id.*

14. Subrin, *David Dudley Field*, *supra* note 9, at 311.

15. *Id.*

16. *Id.*

17. *Id.* Professor Hazard traces a similar sloppy reliance on pre-Field Code nineteenth-century procedural writings. See HAZARD, *supra* note 1, at 116-17.

18. Subrin, *David Dudley Field*, *supra* note 9, at 311-12.

19. *Id.* at 312.

20. *Id.* at 311.

21. "Those who cannot remember the past are condemned to repeat it." G. SANTAYANA, *REASON IN COMMON SENSE* 284 (Dover 1980) (volume one of *The Life of Reason*). It has been suggested that in certain substantive actions courts are becoming more stringent in scrutinizing the sufficiency of complaints and that the essence of common law code pleading is slowly seeping back into the requirements for valid pleading. This trend is ongoing despite the clear intent of the Federal Rules of Civil Procedure to avoid the strictures of technical pleading requirements. See FED. R. CIV. P. 8; see generally Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433 (1986) (discussing the trend toward more detailed pleading practice).

22. HAZARD, *supra* note 1. Professor Hazard's study was prepared for the Walter E. Meyer Research Institute of Law pursuant to a request to make a "critical examination and evaluation of the research activities in the United States which relate to legal institutions and processes." *Id.* at iii. His study was one of several monographs discussing the state of legal research in several fields.

past, to acknowledge that a page of history is worth a volume of logic. It is uncommon to undertake to write that page."²³

Having accounted for the inaction and attitudes of his colleagues, Professor Hazard offered this reason for the historical study of procedure:

Yet at the most immediate pragmatic level we know that any presently operative rule of law is a three-dimensional mosaic, composed of pieces not only of varying size but of varying antiquity. A plane [sic] rendering of the law does not disclose these irregularities; an historical rendering does. For broader purposes of law reforms, the lessons of history are second-hand lessons in life and when learned endow those who would reform the law with a more seasoned confidence.²⁴

In general, Professor Hazard's study of research in civil procedure is interesting because it has preserved, amber-like, observations made twenty-five years after the creation of the Federal Rules. The study, a historical document itself, marks the middle of the modern procedural era and thus affords the opportunity to revisit its themes as well as to assess progress and retreat.

III. THE HAZARD STUDY ON THE STATE OF SCHOLARSHIP IN CIVIL PROCEDURE

Professor Hazard reached four general conclusions concerning the state of civil procedure research. First, little attention had been paid to the theoretical and philosophical bases of procedure.²⁵ Second, most doctrinal research that formed the core product of procedural writing was narrowly directed at legislative reform. Third, empirical studies of procedure were still largely nascent, suffering from "exaggerated expectation and limitations in the art of the social disciplines related to law."²⁶ Finally, "[a]lthough many contemporary procedural problems arise from or are complicated by historical considerations, historical research in procedure has been seriously neglected."²⁷

Professor Hazard's study is a lengthy examination of these gloomy conclusions. The current scholarly terrain, in contrast, offers some good news along with some equally gloomy data. The good news is that empirical research has blossomed and flourished with an infusion of talent and insight from quarters that Professor Hazard correctly predicted.²⁸ The bad news is that procedural scholarship has largely failed

23. *Id.* at 115-16. See *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) (Holmes, J.) ("Upon this point a page of history is worth a volume of logic.").

24. HAZARD, *supra* note 1, at 116.

25. *Id.* at 5, 63-93.

26. *Id.* at 6.

27. *Id.*

28. *Id.* at 98-114. Professor Hazard observed that virtually no procedural research had been produced by political scientists or sociologists, but he predicted that social psychologists as well as economists might make useful contributions to procedural research. Indeed, he urged law professors to seek collaborators in these disciplines: "In summary, the researchers in law of the near future may hopefully look to the sociologists for general help and interest and perhaps to the economists on the points mentioned above. I have doubt that efforts with other disciplines should be seriously pursued for the present." *Id.* at 106.

Since the publication of the Hazard study in 1963, numerous books, monographs, and articles have been published utilizing empirical methodology or interdisciplinary perspectives on procedural problems. See, e.g., D. BARNES & J. CONLEY, *STATISTICAL EVIDENCE IN LITIGATION: METHODOLOGY, PROCEDURE, AND PRACTICE* (1986); H. KALVEN, JR. & H. ZEISEL, *THE AMERICAN JURY* (1966); E.A. LIND & T. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988); M.

to progress in Professor Hazard's three other categories. Indeed, in the case of doctrinal research, such efforts have fallen on hard times in the academy. And notwithstanding the proliferation of flashy theoretical pieces on federal courts and constitutional law,²⁹ hard-core civil procedure (as opposed to federal courts and legal process) has failed to produce its philosopher. Then as now, Professor Hazard had to borrow federal courts scholars to make the unconvincing case for evidence of procedural philosophy.

It is somewhat more difficult to assay the fate of historical procedural research. On the one hand, Professor Hazard's blanket assertion that there basically was not much to talk about,³⁰ happily, is not true today. But on the other hand, there seems to exist a kind of pedagogical schizophrenia between teaching materials and scholarly output. The casebook trend is towards evisceration if not total elimination of historical materials,³¹ while historical research seems to be enjoying a minor resurgence.³²

Though not a cause for being overly pessimistic, this phenomenon probably represents a net loss. When historical materials disappear from the casebooks, they disappear from the classroom. In short, the tradition is lost; the historical context is not transmitted; the next generation lacks the insight that informs past, present, and future discourse. It is not enough to suggest that the historical materials are there for the reading; the fact is that neither teachers nor students will take the time to read and

ROSENBERG, *THE PRETRIAL CONFERENCE AND EFFECTIVE JUSTICE* (1964); D. SAARI, *AMERICAN COURT MANAGEMENT: THEORIES AND PRACTICES* (1982); M. SAKS & C. BARON, *THE USE/NONUSE/MISUSE OF APPLIED SOCIAL RESEARCH IN THE COURTS* (1980); J. THIBAUT & L. WALKER, *PROCEDURAL JUSTICE* (1975); D. TRUBEK, J. GROSSMAN, W. FELSTINER, H. KRITZER & A. SARAT, *CIVIL LITIGATION RESEARCH PROJECT: FINAL REPORT* (1983); Thibaut & Walker, *A Theory of Procedure*, 66 CALIF. L. REV. 541 (1978); Walker, Lind, & Thibaut, *The Relation Between Procedural and Distributive Justice*, 65 VA. L. REV. 1401 (1979).

In addition, both the Federal Judicial Center in Washington D.C. (established by Congress in 1967) and the Rand Institute for Civil Justice in Santa Monica, California regularly publish empirical studies of procedural topics. These articles and monographs are too numerous to list, but catalogues of publications are available from both organizations upon request.

The most prominent book-length treatment of legal issues from an economic perspective has been, of course, Judge Posner's *Economic Analysis of Law*, which contains some sections on procedural issues. See R. POSNER, *ECONOMIC ANALYSIS OF LAW* 429-57 (3d ed. 1986). Again, the law-and-economics literature is now both vast and in vogue, with too many titles to list. However, many procedural issues have provided the basis for economic analysis. See, e.g., Brunet, *A Study in the Allocation of Scarce Judicial Resources: The Efficiency of Federal Intervention Criteria*, 12 GA. L. REV. 701 (1978); Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525 (1978); Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399 (1973).

29. For example, one of the longest-running scholarly debates has been the ultimately unresolvable argument surrounding the parity (or lack thereof) between federal and state courts. This round robin of critical commentary may be traced to Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977), followed by Neuborne, *Toward Procedural Parity in Constitutional Litigation*, 22 WM. & MARY L. REV. 725 (1981), which spurred Solimine & Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 HASTINGS CONST. L.Q. 213 (1983). For the most recent installments in this debate, see Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233 (1988); Redish, *Judicial Parity, Litigant Choice, and Democratic Theory: A Comment on Federal Jurisdiction and Constitutional Rights*, 36 UCLA L. REV. 329 (1988) ("So much has been written by both jurists and scholars over the last twenty years on the issue of state and federal court 'parity' that it has been difficult to imagine at this point anything new being said or some important and original insight being discerned." *Id.* at 329 (footnote omitted).); Chemerinsky, *Federal Courts, State Courts, and the Constitution: A Rejoinder to Professor Redish*, 36 UCLA L. REV. 369 (1988).

30. HAZARD, *supra* note 1.

31. For an extreme example of this phenomenon, see COVER, FISS & RESNIK, *supra* note 9. With the exception of an appendix at pages 1787-824 dealing with the promulgation of the Federal Rules (*On Reading the Rules*), this casebook is bereft of historical materials. See Mullenix, *Metaprocedure*, *supra* note 7, at 1167.

32. See *infra* notes 90-104 and accompanying text.

think about the historical materials. This takes time and effort, both of which are in short supply for teachers as well as students.

And further, why should they take the time? Casebooks, in a fashion, validate current intellectual consensus as to what is important to study. When the texts, over time, de-emphasize historical materials; when professional colleagues pay ritual but hollow obeisance to the value of history; when students habitually complain about inscrutability or ennui, why then should procedure teachers seek out historical materials?

Thus, although there is a renaissance of interest in historical topics, in truth the proponents of such research are writing for a small, dedicated group of cognoscenti. The procedural historians will not let the light go out; their labors lovingly tend that intellectual flame. Nonetheless, the prevailing vision of the procedural future is ahistorical.

This ahistoricism perhaps marks the culmination of a trend noted in the Hazard study. There, the summary of extant historical research comprised six pages of a one hundred-and-twenty-page report.³³ Approximately half of that discussion was devoted to reasons for the importance of history and problems with such scholarship. The paucity of reported scholarship itself, then, speaks volumes for the historical inattention to procedural history. Professor Hazard found that there was no general study of American procedural history similar to Holdsworth's or Plucknett's books on English legal history.³⁴ This gap in scholarship substantially remains today, although a number of studies of the common law have appeared since the publication of the Hazard study.³⁵ Similarly, Professor Hazard noted that with the exception of a few pieces, no scholar had written a systematic study of the origins and development of American judicial and procedural institutions.³⁶ Again, the surprising fact is that in twenty-five years, no scholar has yet written a good legal history of the federal courts, a lacuna noted by more than one commentator.³⁷

33. HAZARD, *supra* note 1, at 114-20.

34. *Id.* at 115; see W. HOLDSWORTH, *HISTORY OF THE ENGLISH LAW* (6th ed. 1938); T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* (5th ed. 1956). Also noted as good sources for the history of Anglo-American jurisprudence were R. MILLAR, *CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE* (1952); F. MAITLAND, *FORMS OF ACTION AT COMMON LAW* (1936); and C. HEPBURN, *THE DEVELOPMENT OF CODE PLEADING IN AMERICA AND HISTORICAL ENGLAND* (1897).

35. See, e.g., J.H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* (2d ed. 1979); G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982); M. EISENBERG, *THE NATURE OF THE COMMON LAW* (1988); L.M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* (2d ed. 1985); J.H. KOFFLER & A. REPPY, *HANDBOOK OF COMMON LAW PLEADING* (1969); S.F.C. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* (2d ed. 1981).

36. HAZARD, *supra* note 1, at 115. Noted Professor Hazard:

Professor Julius Goebel, Jr. has observed that the cause of American legal history has been ill-served by both lawyers and historians. I have no doubt that this disservice is one of the prices we have paid for conducting education about law almost exclusively in professional schools. The historian has difficulty penetrating the professional milieu; the typical law professor's posture toward the history of the subject is to regard it as essentially an extrapolation of the principle of *stare decisis*.

Id. (footnotes omitted).

37. See, e.g., C. MCCORMICK, J. CHADBURN, & C. WRIGHT, *FEDERAL COURTS: CASES AND MATERIALS* 1 (8th ed. 1988) ("An adequate history of the federal judicial system would be an enlightening contribution. It has yet to be written."). The sources on the federal judicial system noted by the authors predate 1953 and were obviously available at the time of the Hazard study. Two books published since then, but not especially focused on procedural history, are H. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* (1973); and M. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE*

Moreover, the Hazard study noted with surprise that with one or two exceptions, no scholars had written on statutory procedural developments prior to the Field Code.³⁸ If contemporary procedure teachers view 1938 as the edge of the known procedural universe, then it seems that twenty-five years ago the falling-off point at least extended to David Dudley Field. Indeed, Professor Hazard traced almost all modern accounts of procedure to statements, restatements, and misstatements of Justice Story's *Commentaries on Equity Pleadings*, a telling disregard for the importance of history for proceduralists.³⁹

Finally, Professor Hazard observed that virtually all post-1938 procedural rules were shaped or affected by precodification statutes "[y]et none of these historical problems has been given the attention it deserves and should have."⁴⁰ Suggesting that proceduralists in search of publishable topics might profitably explore historical themes, he noted that such an endeavor might provide not only topics, but careers. Unintentionally anticipating Professor Subrin's scholarship, Professor Hazard concluded: "At the turn of this century, Maitland said that the common law forms of action rule us from their graves. I think it can be said that the formulae of equity likewise rule us today. They will do so until they are met and mastered."⁴¹

The Hazard study of the state of civil procedure scholarship not only provided a topography of types of research but also offered a rudimentary framework for contemplating various institutional sources of legal scholarship. Four centers of

ALLOCATION OF JUDICIAL POWER (1980). In addition, the American Law Institute published its *Study of the Division of Jurisdiction Between State and Federal Courts* (Official Draft 1969), which in turn generated critical commentary in the academic literature. See C. McCORMICK, J. CHADBOURN & C. WRIGHT, *supra*, at 1 n.1. It is not insignificant that Professor Hazard in 1963, and Professor Wright and Judge Posner more recently, must point to the 1928 Frankfurter and Landis book as the classic historical study of American legal institutions and processes. See generally F. FRANKFURTER & J. LANDIS, *THE BUSINESS OF THE SUPREME COURT* (1928) (cited in HAZARD, *supra* note 1, at 118 n.189); R. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 23 n.1 (1985); C. WRIGHT, *THE LAW OF THE FEDERAL COURTS* 1 n.1 (4th ed. 1983).

38. HAZARD, *supra* note 1, at 117.

39. Writes Professor Hazard:

Story's work, the only one of these that has utility as a source on equity procedure, is quite inadequate for the purpose. It was hastily prepared, often uncritical, and, above all, unhistorical in that Story tended to treat all reports of Chancery cases on an equal footing logically and chronologically. This treatment completely obscured the uncertainties and contradictions that abounded in equity procedural rules and ignored the important changes in direction and procedural philosophy that occurred in the eighteenth century.

Id. Professor Subrin has suggested a similar contemporary misapprehension of the relationship of the modern Federal Rules of Civil Procedure to the Field Code: "[I]t is important to review the mythology that has clouded our vision. We have been misled about the relationship of the Field Code and the Federal Rules, both by outright assertion and by legend." Subrin, *David Dudley Field*, *supra* note 9, at 312.

40. HAZARD, *supra* note 1, at 117-18. Among the procedural rules that Professor Hazard noted as having been neglected by historical research were the broad categories of joinder, including compulsory and permissive joinder of plaintiffs and defendants; intervention; real parties in interest; cross-claims; counterclaims; interpleader; and class actions. With the exception of class actions, see *infra* note 46, few of these topics have received thoughtful historical examination since the publication of Professor Hazard's study. He also suggested that discovery, jurisdiction and venue, post-trial motions, judicial control of juries, and appeals also suffered neglect from the historical perspective. Again, although some exceptional pieces might be noted, see, e.g., Gardner, *Agency Problems in the Law of Attorney-Client Privilege: Privilege and "Work Product" Under Open Discovery* (pts. 1 & 2), 42 U. DET. L.J. 105, 253 (1965) [hereinafter Gardner, *Agency Problems*]; Gardner, *Privilege and Discovery: Background and Development in English and American Law*, 53 GEO. L.J. 585 (1965), Professor Hazard's observation remains substantially true today.

41. HAZARD, *supra* note 1, at 118. See Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987) [hereinafter Subrin, *How Equity Conquered Common Law*]; Subrin, *David Dudley Field*, *supra* note 9. Professor Subrin's two articles are portions of a book he is currently writing on the history and ideology of the Rules Enabling Act and the Federal Rules of Civil Procedure.

scholarly enterprise were identified: commercial law book publishers; the practicing bar; public agencies for making and administering the law; and universities.⁴² Not surprisingly, Professor Hazard concluded that the first three sources were limited founts of scholarly production.⁴³ Again, this broad generalization, with some notable exceptions, continues to be true today; the locus of historical research remains in the province of the universities.

This framework is still useful and will guide the remainder of this Article, which surveys the contemporary terrain of research in procedural issues with a particular focus on efforts involving the study of the history of procedure. There is much to celebrate here. Academicians have now produced noteworthy, lengthy books on procedural topics,⁴⁴ and others are in progress.⁴⁵ Even more encouraging, a number of proceduralists have heeded the call to engage in thorough historical research into contemporary rules.⁴⁶ Another surprising development is the emergence of the close contextual study of individual landmark decisions.⁴⁷ Finally, although much historical research has been accomplished and is in progress, it is as true now as it was twenty-five years ago that much remains to be done.⁴⁸

IV. CONTEMPORARY EFFORTS AT THE HISTORICAL STUDY OF PROCEDURE

A. *The Commercial Publishers*

The first institutional source of procedural scholarship identified by Professor Hazard was the commercial publishers; he found that commercial publishers, for a variety of fairly obvious reasons, were not a likely source of initiation, support, or

42. HAZARD, *supra* note 1, at 20–21.

43. *Id.* at 21–45. In fairness, Professor Hazard suggested that much good work was being produced by organized bar associations—in particular the research efforts of the American Bar Foundation—and various judicial administration agencies. Perhaps because of their almost purely reportorial function, Professor Hazard did not view the commercial publishers as productive institutional sources of procedural scholarship.

44. See, e.g., L. BRILMAYER, AN INTRODUCTION TO JURISDICTION IN THE AMERICAN FEDERAL SYSTEM (1986); G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982); R. CARP & C.K. ROWLAND, POLICYMAKING AND POLITICS IN THE FEDERAL DISTRICT COURTS (1983); M. EISENBERG, THE NATURE OF THE COMMON LAW (1988); T. FREYER, HARMONY AND DISSONANCE: THE SWIFT & ERIE CASES IN AMERICAN FEDERALISM (1981); C. HARRINGTON, SHADOW JUSTICE: THE IDEOLOGY AND INSTITUTIONALIZATION OF ALTERNATIVES TO COURT (1985); G. McDOWELL, EQUITY AND THE CONSTITUTION (1982); S. MILSON, HISTORICAL FOUNDATIONS OF THE COMMON LAW (2d ed. 1981); R. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM (1985); G. POSTEMA, BENTHAM AND THE COMMON LAW TRADITION (1985); M. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER (1980); P. SCHUCK, AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS (1986); A. WATSON, THE MAKING OF THE CIVIL LAW (1981); S. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION (1987). See also *supra* notes 35, 37 (listing additional sources).

45. See *supra* note 41.

46. See, e.g., Cooper, *Directions for Directed Verdicts: A Compass for Federal Courts*, 55 MINN. L. REV. 903 (1971); Yeazell, *From Group Litigation to Class Action* (pts. 1 & 2), 27 UCLA L. REV. 514, 1067 (1980); Yeazell, *Group Litigation and Social Context: Toward a History of Class Action*, 77 COLUM. L. REV. 866 (1977). Professor Yeazell's articles formed the basis for his book; see *supra* note 44. In addition to historical research on particular rules, also noteworthy are recent exhaustive historical studies on the rulemaking process itself, or on aspects of doctrinal history. See Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982); Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881 (1986); Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses* (pts. 1 & 2), 14 CREIGHTON L. REV. 499, 735 (1981).

47. See Perdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and Pennoyer Reconsidered*, 62 WASH. L. REV. 479 (1987).

48. For a list of some topics in need of historical research, see *supra* note 40.

transmission of procedural research.⁴⁹ This conclusion remains essentially true today; the pure reportorial function that Professor Hazard described remains the primary function of most commercial materials, and that function is not conducive to encouraging or publishing procedural research. Also, market economics has demonstrated that most procedural research, except for purely practitioner-oriented pieces, simply will not sell, and commercial publishers are in the business of volume sales, not the scholarly pursuit of truth or law reform. What is true for procedural research in general has even greater force for historical materials; as consumer interest wanes in the history of procedure, the likelihood of successful commercial publication diminishes.

In the law schools, at least, casebooks remain the major vehicle for the transmission of the canon of any subject, and Professor Fink has predicted that the history of procedure will disappear from procedure casebooks.⁵⁰ A review of six current editions of casebooks from the three major legal publishing houses supports the suggestion that historical procedure receives scanty, and spotty, textbook treatment.⁵¹ The three topics most conducive to historical treatment—pleading, class actions, and the right to trial by jury—receive, in most instances, brief introductory discussion. Indeed, the history of the class action device is accorded zero to five pages in the texts, and historical discussion of the jury trial averages three pages.⁵²

49. HAZARD, *supra* note 1, at 21–28. Professor Hazard viewed commercial publishers as being primarily engaged in data retrieval and reportorial transmission of legal information through such vehicles as law reports, digests, annotations, and treatises. He observed that commercial publishers were unlikely to engage in the “quest for more satisfactory conceptions of the problems of procedure and the development of more satisfying answers”:

I assume they do not conceive it their function to undertake these tasks, but only to perform the reportorial function. This limitation no doubt is self-imposed on the assumption that their customers are interested in a supply of answers rather than speculations as to what different answers there might be. And since that assumption is tested in the market place, there is little reason to suppose that it is wrong. In any case, it is difficult to believe that there will be any significant change in the pattern of operations by the commercial publishers.

Id. at 28.

50. See H. Fink, Remarks at the AALS Conference on Civil Procedure (June 6, 1988) (entitled *The Proper Role of History in the Study of Civil Procedure*); see *supra* note 31 on that prophesy fulfilled.

51. The six texts reviewed were not selected for any particular reason other than accessibility on this writer's bookshelf, hence the highly unscientific nature of the sample and survey. The texts examined were: P. CARRINGTON & B. BABCOCK, *CIVIL PROCEDURE: CASES AND COMMENTS ON THE PROCESS OF ADJUDICATION* (3d ed. 1983) [hereinafter CARRINGTON] (Little, Brown & Co.); J. COUND, J. FRIEDENTHAL, A. MILLER & J. SEXTON, *CIVIL PROCEDURE: CASES AND MATERIALS* (4th ed. 1985) [hereinafter COUND] (West Pub. Co.); J. LANDERS, J. MARTIN & S. YEAZELL, *CIVIL PROCEDURE* (2d ed. 1988) [hereinafter LANDERS] (Little, Brown & Co.); D. LOUISELL, G. HAZARD, JR. & C. TAIT, *PLEADING AND PROCEDURE, STATE AND FEDERAL: CASES AND MATERIALS* (6th ed. 1989) [hereinafter LOUISELL] (Foundation Press); R. MARCUS, M. REDISH & E. SHERMAN, *CIVIL PROCEDURE, A MODERN APPROACH* (1989) [hereinafter MARCUS] (West Pub. Co.); M. ROSENBERG, H. SMIT & H. KORN, *ELEMENTS OF CIVIL PROCEDURE: CASES AND MATERIALS* (4th ed. 1985) [hereinafter ROSENBERG] (Foundation Press). This writer acknowledges that the casebook that treats the history of procedure in the most thorough-going fashion remains R. FIELD, B. KAPLAN & K. CLERMONT, *MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE* (5th ed. 1984) [hereinafter FIELD] (Foundation Press); see *id.* at 299–419 (*Part Two: The Unitary Civil Action*, tracing the evolution of the common law, the development of the system of equity, the abolition of the forms of action, and the merger of law and equity). The book devotes approximately 120 pages to the development of these themes. For a critique of this seminal casebook and its traditional pedagogy, see Eskridge, *Metaprocedure*, 98 YALE L.J. 945, 947–51, 962–64 (1989).

52. See CARRINGTON, *supra* note 51, at 1006–07 (note on the class action suit in equity), 170–73 (note on the attraction of trial by jury); COUND, *supra* note 51, at 622–27 (history and philosophy of the class action), 812–17 (the institution of the trial by jury); LANDERS, *supra* note 51, at 545–47 (introductory note to class actions), 703–06 (background note to trial by jury); LOUISELL, *supra* note 51, at 823–25 (historical note on class action suits), 1001–03 (note on the right to jury trial under the United States Constitution); MARCUS, *supra* note 51, at 266 n.3 (noting Professor

In most instances, the edited case reports must shoulder the burden of explaining any relevant historical context or predicate for the decisionmaking process.

The textbook treatment of the history of pleading is uneven, at best. Four of the six casebooks contain historical discussions varying from two to eleven pages,⁵³ yet two books offer lengthy, full-chapter expositions of the historical antecedents to modern pleading.⁵⁴ In short, as a percentage of total casebook pages, historical materials rank very low; clearly, some texts have other fish to fry, and in doing so, they sacrifice history to make room for different interdisciplinary materials.⁵⁵ It is difficult to assess whether the dearth of historical materials in the casebooks is the result of disinterest, irrelevance, commercialism, or some other cause; the fact remains that procedural casebooks are largely ahistorical and are becoming more so. This trend extends to the gradual disappearance of whole segments of doctrinal history. The ever-shifting sands of personal jurisdiction jurisprudence, for example, suffer a variable fate in the casebooks. The full-text reporting of *Swift v. Tyson*,⁵⁶ it seems, has gone the way of the dodo bird.⁵⁷

To the extent that casebook presentation makes a statement about the professorial conception of the discipline, the casebooks send the message that procedural history does not count for much. The casebooks are silent accomplices in the patronizing obeisance to history that Professor Hazard identified, and the texts help to perpetuate a dislike, if not a disdain, for historical perspectives. These are the texts and the thinking that are nurturing the next generation of the professoriate. The question for the academy, of course, is whether this is cause for concern.

B. *The Practicing Bar*

Professor Hazard's second institutional source of procedural research was the practicing bar, which he divided into individual attorneys and the organized bar. As to the first, he viewed individual practicing attorneys as an extremely limited source

Yeazell's book), 433–35 (seventh amendment right to trial by jury); ROSENBERG, *supra* note 51, at 538–40 (historical development note on class actions), 796–99 (excerpts from *A Sketch of English Legal History* by Maitland and Montague).

53. See CARRINGTON, *supra* note 51, at 733–44 (common law demurrer and dilatory defenses; the code demurrer and its Federal Rules analogue); LOUISELL, *supra* note 51, at 18–29 (historical note on procedure generally); MARCUS, *supra* note 51, at 109–14 (the historical evolution of pleading); ROSENBERG, *supra* note 51, at 611–13 (common law and contemporary devices).

54. See COUND, *supra* note 51, at 386–441 (the development of modern pleading and procedure); LANDERS, *supra* note 51, at 347–95 (common law pleading, forms of action, equity, and code pleading).

55. See COVER, FISS & RESNIK, *supra* note 9; see also Eskridge, *supra* note 51, at 954:

A more fundamental problem is the book's anti-historicism. Its focus on the "here and now" and its neglect of background and evolution are striking . . . The authors snub such useful historical materials as the history of pleading, the evolution of law and equity, and the background of federal subject-matter jurisdiction. The book boils down into capsule summaries the historical twists and turns of the *Erie* and personal jurisdiction cases. This apparent anti-historicism is troubling, because the evolution of rules and doctrine is essential to understanding them, and even to reforming them. Legal reasoning itself is a dynamic interaction between a present controversy and historical texts (statutes, cases, and rules), and students lose this rich tradition if argument is limited to current justifications for doctrine.

Id. (footnotes omitted). For the same observation, see Mullenix, *Metaprocedure*, *supra* note 7, at 1163–65, 1167–68.

56. 41 U.S. (16 Pet.) 1 (1842).

57. See COVER, FISS & RESNIK, *supra* note 9 (no full-text report of *Swift v. Tyson*).

of research activity, with the tradition of the amateur gentleman-scholar disappearing because of the constraints of modern legal practice.⁵⁸ Again, this observation remains true today, although (as was the case then) one may still point to the exceptional instances of scholarly writing by individual practitioners.⁵⁹ Moreover, what is true for procedural research in general bears relevance for historical scholarship; the individual practitioner-cum-amateur procedural historian is rare, indeed.

Among the organized bar, Professor Hazard identified the American Bar Foundation as the primary institution independent of academic affiliation that supported and published procedural studies.⁶⁰ This tradition has continued, with the *American Bar Foundation Research Journal* publishing many procedural studies with historical content.⁶¹ Thus, the American Bar Foundation has continued as a strong source of nonuniversity-generated historical studies of procedure.

C. Public Agencies

Under the general rubric of "public agencies" Professor Hazard grouped legislative bodies, rulemaking bodies performing a legislative function, and the judiciary. In the first two categories Professor Hazard included state and federal legislative committees involved in rule revision, the Advisory Committee on the Federal Rules of Civil Procedure, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, and the Advisory Committee on Practice and Procedure of the New York Temporary Commission on the Courts. In the third category he included judicial administration agencies such as state judicial councils, the Administrative Office of the United States Courts, and judges and courts themselves.⁶²

58. See HAZARD, *supra* note 1, at 28–32. Of this phenomenon he observed:

In an earlier day, if the older law reviews are indicative, it appears to have been an important avocation of many members of the bar to engage in research for its own sake. This seems to be less common today, in procedure at least. Perhaps it is because the intricacy of the problems and the volume of materials make the task more formidable, perhaps because of the press of business, perhaps because lawyers no longer consider themselves as members of a learned profession in the old sense. Quite likely, sensitivity to the demands of efficiency and the demands of business have thinned the ranks of amateur scholarship in law as in other fields.

Id. at 29.

59. See, e.g., W. FREEDMAN, *FRIVOLOUS LAWSUITS AND FRIVOLOUS DEFENSES* (1987); Gardner, *Agency Problems*, *supra* note 40; Gruson, *Forum-Selection Clauses in International and Interstate Commercial Agreements*, 1982 U. ILL. L. REV. 133; Gruson, *Governing-Law Clauses in International and Interstate Loan Agreements—New York's Approach*, 1982 U. ILL. L. REV. 207; Rubin, *Toward a General Theory of Waiver*, 28 UCLA L. REV. 478 (1981).

60. See HAZARD, *supra* note 1, at 34–36.

61. Beginning with volume 13 in 1988, the journal's name was changed to *Law and Social Inquiry*. The studies and projects published in the *American Bar Foundation Research Journal* form a sizeable literature, and the reader is referred to the indices of that journal. For an example of two studies that have incorporated a historical approach to procedural issues, see Brazil, *Referring Discovery Tasks to Special Masters: Is Rule 53 a Source of Authority or Restrictions?*, 1983 AM. B. FOUND. RES. J. 143; Steele, *The Historical Context of Small Claims Courts*, 1981 AM. B. FOUND. RES. J. 293. In addition to its own merits, Professor Brazil's article is noteworthy for its reliance on the historical scholarship of another proceduralist, Professor Silberman. See Silberman, *Masters and Magistrates Part I: The English Model*, 50 N.Y.U. L. REV. 1070 (1975); Silberman, *Masters and Magistrates Part II: The American Analogue*, 50 N.Y.U. L. REV. 1297 (1975).

The American Bar Association also now has a Standing Committee on Federal Judicial Improvements. That committee recently issued a report, *THE UNITED STATES COURTS OF APPEALS: REEXAMINING STRUCTURE AND PROCESS AFTER A CENTURY OF GROWTH* (1989).

62. See HAZARD, *supra* note 1, at 36–45.

Since these bodies were, in various fashions, involved with ongoing rule interpretation, revision, and reform, Professor Hazard found them to be fruitful sources of certain kinds of procedural research.⁶³ And these entities or their descendants remain a source of procedural scholarship today. However, with the exception of an occasional judicial opinion, none of these institutional sources provides much in the way of historical scholarship. Since the publication of Professor Hazard's study, the Federal Rules of Civil Procedure have been amended several times, and to the extent that every rule revision generates literature analyzing past practice, the material produced by these bodies is "historical." But very little of this literature delves beyond problems of immediate past practice or reaches back to pre-1938 procedural history.⁶⁴ In that regard, the work product of the public agencies has been as ahistorical as that of the rest of the research universe.

It should be noted that at least two public agency research efforts are currently under way that may fill the gap in historical understanding of the American procedural system. First, Congress has authorized a broad study of the federal courts.⁶⁵ Second, although it remains to be seen how much of that institutional study will incorporate a historical perspective, Congress in the same act authorized a legal history project to be conducted under the auspices of the Federal Judicial Center.⁶⁶

Finally, turning to the courts themselves, Professor Hazard rightly concluded that busy, overburdened judges were not likely candidates to craft scholarly procedural opinions. For whatever reasons then⁶⁷ and for whatever reasons now, judges are not productive sources of procedural scholarship, especially not historical scholarship.

There are noteworthy exceptions; on occasion, a scholarly judge will recognize the historical import of a legal issue and warm to the subject, producing an erudite treatise on legal history. The most impressive recent example of this is Judge Posner's opinion in *Olson v. Paine, Webber, Jackson & Curtis, Inc.*,⁶⁸ in which he

63. *Id.* at 37-38. Professor Hazard noted:

Suffice it to say here that much of the significant thought about procedural problems in the last 25 years has emerged directly or indirectly from proposals for legislative change of procedural rules. The judiciary's contribution to legal scholarship is made, first, in the increasingly important activities of judicial administration agencies—judicial administrators, judicial councils, judicial conferences and like organizations—and, second, in the course of the judiciary's case-deciding function.

Id. at 38. Such procedural research was not without its problems and flaws; see *id.* at 40-45.

64. See, e.g., A. MILLER, *THE AUGUST 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY* (1984); Cooper, *Work Product of the Rulesmakers*, 53 MINN. L. REV. 1269 (1969); Marcus, *Reducing Court Costs and Delay: The Potential Impact of the Proposed Amendments to the Federal Rules of Civil Procedure*, 66 JUDICATURE 363 (1983).

65. Judicial Improvement and Access to Justice Act, Pub. L. No. 100-702, §§ 101-09, 102 Stat. 4642, 4644-45 (1988) (establishing the Federal Courts Study Committee).

66. *Id.* § 302, 102 Stat. 4642, 4648.

67. See HAZARD, *supra* note 1, at 41-45. Professor Hazard stated: "But if a distinction is taken between those decisions which add to the quantum of doctrine and those which yield new scientific insight, then it seems fair to say that only a small fraction of judicial decisions are a contribution to legal scholarship." *Id.* at 41. Elsewhere he observed that "[m]ost recent efforts to put decisional opinions on a scholarly footing have been by judges who were formerly professional legal scholars." *Id.* at 42.

68. 806 F.2d 731 (7th Cir. 1986).

produced a lengthy analysis of the *Enelow-Ettelson* doctrine,⁶⁹ an interlocutory appeal exception rooted in pre-Federal Rules procedure. Generally, the *Enelow-Ettelson* doctrine permitted immediate appeal of an equitable stay of an action at law. Not unexpectedly, this formulation led to much parsing of legal history in order to construe what judicial action constituted an "equitable stay . . . of a suit at law."⁷⁰

In a closely crafted opinion, Judge Posner traced the historical derivation of the doctrine, its difficult if not sometimes bizarre application by the courts, and its disfunction in the postmerger procedural era.⁷¹ This historical analysis compelled Judge Posner to summarize that "[t]he case against the doctrine seems . . . conclusive"⁷² and to hope that the Supreme Court would repudiate the doctrine.⁷³

Within two years of Judge Posner's consideration of the problem, the Supreme Court did just that.⁷⁴ In overturning the *Enelow-Ettelson* doctrine, the Court noted that "[t]he artificiality of the *Enelow-Ettelson* doctrine is not merely an intellectual infelicity; the gulf between the historical procedures underlying the rule and the modern procedures of federal courts renders the rule hopelessly unworkable in operation."⁷⁵ The Supreme Court reached this result by relying on the "extensive and scholarly critique of the doctrine"⁷⁶ by Judge Posner, as well as the less erudite but equally penetrating observations of other federal judges that the doctrine was "a remnant from the jurisprudential attic,"⁷⁷ "an anachronism wrapped up in an atavism,"⁷⁸ and a "Byzantine peculiarit[y]."⁷⁹

When confronted with a legal issue imbued with historical reach, the Supreme Court generally rises to the occasion and recites what has now become high-level boilerplate legal history. Nowhere is this more evident than in seventh amendment right-to-trial-by-jury cases, one of the few instances where the Supreme Court still relies on eighteenth-century English precedent. As recently as in *Tull v. United States*,⁸⁰ the Supreme Court was going through the uninspired paces of determining whether statutory civil penalty cases were analogous to actions in debt in English courts of law prior to 1791.⁸¹

Students, who can find little of relevance before their own lifetimes, are typically stupefied to discover the Supreme Court agonizing over archaic forms of

69. See *Enelow v. New York Life Ins. Co.*, 293 U.S. 379 (1935); *Ettelson v. Metropolitan Life Ins. Co.*, 317 U.S. 188 (1942).

70. *Olson*, 806 F.2d at 733.

71. *Id.* at 733-41.

72. *Id.* at 741.

73. *Id.* at 742. Judge Posner stopped short of repudiating the doctrine in the case before him, largely for reasons of stare decisis: "Despite all this we think it would be improper for this court to reject the doctrine." *Id.* at 741; see *id.* at 741-42 (explanation of nonrepudiation).

74. *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 108 S. Ct. 1133 (1988).

75. *Id.* at 1140-41.

76. *Id.* at 1142.

77. *Danford v. Schwabacher*, 488 F.2d 454, 455 (9th Cir. 1973).

78. *Hartford Fin. Sys., Inc. v. Florida Software Servs., Inc.*, 712 F.2d 724, 727 (1st Cir. 1983).

79. *New Eng. Power Co. v. Asiatic Petroleum Corp.*, 456 F.2d 183, 189 (1st Cir. 1972).

80. 481 U.S. 412 (1987).

81. *Id.* at 417-25.

action; more specifically, most think it absurd that the Court should be bound to some old convention determined artificially by the date 1791. If nothing else, the right-to-jury cases dramatically make the point that procedural history has some bearing on practical lawyering; but it is sad, if not vaguely amusing, to read Supreme Court briefs in right-to-jury cases in which attorneys struggle to discover ancient analogies in ancient sources replete with ancient terminology.⁸²

Although the Supreme Court episodically provides some decent procedural history, for the most part, its procedural vision is as circumscribed as is that of the fifteenth-century sailor described at the outset. The Court's view is very much bound to the post-1938 Federal Rules and rule amendments, supported by their legislative history. Since the Court's basic function is as ultimate rule interpreter, its statutory construction is more likely to run to legislative sources than to any general, independent historical analysis. Thus, the Court ventures into historical discussion only to the extent that the legislative materials embody history as a part of legislative intent.

When not constrained by statutory rules, however, the Court has not vigorously seized the opportunity to locate common-law procedural doctrines in historical context. The Court's repeated pronouncements on the attorney work product doctrine, for example, illustrate this point.⁸³ In *Hickman v. Taylor*,⁸⁴ the seminal case on attorney work product, the Court could have traced the historical nonexistence and unavailability of work product protection in pre-1938 litigation. This research would have revealed few recognizable discovery devices in premerger procedure, with a division of procedures between actions at law and equity.⁸⁵

Recognizing the cumbersome restraints on discovery prior to the enactment of the Federal Rules provides greater understanding of both the liberal discovery intended by the Rules' drafters and the need for protection of attorney work product. In short, this small piece of procedural history helps to explain why the Supreme Court first articulated an attorney work product protection as late as 1947 and why the doctrine was unnecessary prior to that time.

Historical development of jurisdictional theory is similarly wanting. Especially concerning personal jurisdiction, Supreme Court jurisdictional "history" essentially means doctrinal history extending back to *International Shoe*.⁸⁶ For many proceduralists this seminal case marks the point at which they, too, fall into the great historical void. Yes, *Pennoyer v. Neff*⁸⁷ is way back there somewhere, but most civil procedure teachers would be hard put to offer a good, coherent discussion of pre-*International*

82. See, e.g., Briefs for Petitioner and Respondent, *Tull v. United States*, 481 U.S. 412 (1987) (No. 85-1259).

83. See, e.g., *FTC v. Grolier, Inc.*, 462 U.S. 19 (1983); *Upjohn Co. v. United States*, 449 U.S. 383 (1981); *United States v. Nobles*, 422 U.S. 225 (1975); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975).

84. 329 U.S. 495 (1947).

85. See, e.g., Gardner, *Agency Problems* (pt. 2), *supra* note 40, at 287-88; La France, *Work Product Discovery: A Critique*, 68 DICK. L. REV. 351, 353-56 (1964); Special Project, *The Work Product Doctrine*, 68 CORNELL L. REV. 760, 765-66 (1983); Comment, *Ambiguities After the 1970 Amendments to the Federal Rules of Civil Procedure Relating to Discovery of Experts and Attorney's Work Product*, 17 WAYNE L. REV. 1145, 1147-48 (1971).

86. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

87. 95 U.S. 714 (1877).

Shoe personal jurisdiction. More to the point, how many can articulate the legal concept of personal jurisdiction before the ratification of the fourteenth amendment?⁸⁸

Research in procedural history closes these intellectual gaps; our cases and casebooks do not. In turn, today's lack of historical sense and its concomitant overweening focus on the present distort the nature and function of procedural rules, lead to false and misleading arguments about the proper role of proceduralism, and fail to provide students with an adequate framework for contemplating alternative views.

D. *University Law School Research*

The fourth and final institutional source of procedural research—universities—offered Professor Hazard the opportunity to inveigh expansively against the usual litany of evils engendered through university-generated scholarship,⁸⁹ while at the same time recognizing the high quality of many research efforts. Then as now, law professors served on law reform committees; then as now, the universities functioned as research centers for various procedural projects. Law professors still write (or more accurately today, revise) the procedural treatises, and procedural casebooks, as forms of scholarship, still appear perennially. Every criticism of the law review mill and of the overabundance of banal scholarship applies with equal or greater force today. The criticisms probably were not new then, and they certainly are not new now. The viral expansion of problematic, trivial scholarship in the past twenty-five years, however, cannot prove heartening.

Nonetheless, the good news is that in recent years we have witnessed a small renaissance in the publication of superior research in historical studies. Some of this writing has hewn closely to traditional doctrinal exegesis;⁹⁰ other projects have ambitiously delved into pre-eighteenth-century sources.⁹¹ At least one professor has created almost a new genre of historical analysis: the contextual exposition of the landmark case.⁹² In short, these thoughtful and exciting efforts individually demonstrate that historical analysis is not beyond the ken of the procedure teacher; collectively these works reaffirm the utility and intrinsic worth of such endeavors.

This resurgence of interest in the historical examination of procedural topics is encouraging for reasons beyond the standard arguments outlined at the beginning of this Article.⁹³ Broadly formulated, this contemporary historicism serves several important functions: (1) It affects procedural scholarship that is not primarily historical in nature; (2) it supplies prototypes of historical scholarship that proceduralists can fruitfully emulate; and (3) it recaptures annals of legislative and doctrinal

88. See Trangsrud, *The Federal Common Law of Personal Jurisdiction*, 57 GEO. WASH. L. REV. 849 (1989); Whitten, *supra* note 46.

89. See HAZARD, *supra* note 1, at 45–63.

90. See, e.g., Field, *supra* note 46.

91. See S. YEAZELL, *FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION* (1987).

92. See Perdue, *supra* note 47; see also T. FREYER, *supra* note 44, for a book-length historical treatment of the *Swift* and *Erie* cases.

93. See *supra* Part I.

history that, in turn, help shed new light on the transsubstantive debate over the Federal Rules.

First, when one contemplates the effects of recent historical scholarship, there can be little doubt that the importance of at least cursorily discussing procedural antecedents has seeped into the scholarly enterprise. Even studies that are not primarily focused on a historical treatment of a procedural problem typically make some effort to trace historical roots through pre-1938 sources.⁹⁴ Indeed, some pieces now derive their historical introductions from earlier historical studies.⁹⁵ Nonetheless, even this brief, derivative historical scholarship is significant for its recognition of the need to locate contemporary problems in past analysis.

Moreover, without overdrawing the proposition, a good argument might be made that it is the duty of the responsible scholar, especially the critical scholar whose purpose is to challenge the legitimacy of procedure, at least to locate procedure in historical context. As has been argued elsewhere,⁹⁶ the failure to do this renders deconstructive criticism a cheap shot at proceduralism.

Thus, although the typical, cursory historical survey that is incorporated in many procedural articles does not provide a model for in-depth historical research, these efforts are nonetheless laudable for their implicit support of the pedagogical and intellectual values of such material.

Second, there can be no doubt that law faculty scholars have recently produced stunning prototypical historical studies that not only contribute to the knowledge of procedure but also serve as significant models of scholarship for others engaged in the intellectual enterprise. The works of Professors Burbank, Field, Perdue, Subrin, Trangsrud, Yeazell, and others⁹⁷ have provided fresh legitimacy for historical scholarship and have demonstrated by example that proceduralists need not be intimidated by historical inquiry.

In particular, the works of these scholars are commendable, beyond the content of their analyses, for their exploration of source materials not usually consulted by proceduralists and for their willingness to take risks in comprehending, interpreting, and assessing historical evidence. Just as perspectives provided by the various social sciences permit legal problems to be viewed in new and different fashions, so too does argument derived from historical sources. The conclusions drawn may be off the mark, or flat out wrong,⁹⁸ but the exercise is worth the effort because it induces

94. See, e.g., Doernberg & Mushlin, *The Trojan Horse: How the Declaratory Judgment Act Created a Cause of Action and Expanded Federal Jurisdiction While the Supreme Court Wasn't Looking*, 36 UCLA L. REV. 529, 533-42 (1989); Tobias, *Rule 19 and the Public Rights Exception to Party Joinder*, 65 N.C.L. REV. 745, 748-49 (1987).

95. See, e.g., Tobias, *supra* note 94, at 748 n.5 (relying on Hazard, *Indispensable Party: The Historical Origin of a Procedural Phantom*, 61 COLUM. L. REV. 1254 (1961); Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356 (1967); and Reed, *Compulsory Joinder of Parties in Civil Actions*, 55 MICH. L. REV. 327 (1957)).

96. See Mullenix, *Metaprocedure*, *supra* note 7, at 1168.

97. See, e.g., sources listed *supra* notes 9, 41, 44, 46, 47, 88.

98. See, e.g., Kennedy, *Digging for the Missing Link: From Medieval Group Litigation to the Modern Class Action* (Book Review), 41 VAND. L. REV. 1089, 1114-19 (1988) ("One can argue that Yeazell expansively reads each of the historic cases in order to justify his theory of Rule 23, when other explanations are also plausible." *Id.* at 1114 n.117.).

discussion and debate beyond the well-worn parameters established by late twentieth-century proceduralism. And although it is a clichéd concept, historical research teaches that truly new ideas are rare.

Third, many of the historical studies that have recently appeared have recaptured certain annals of the rulemaking process,⁹⁹ or have retraced doctrinal development,¹⁰⁰ in a fashion that should shed light on the ongoing debate concerning the transsubstantive nature of the Federal Rules.¹⁰¹ If it is true that this is the beginning of an era of new proceduralism,¹⁰² then it seems a self-evident imperative that we understand how and why the present rules were created, as well as the import of procedural antecedents at law and equity. It is surprising to hear calls for new procedural rules tailored to particular kinds of cases; this impulse ignores the strong historical analogue to procedural rules rooted in forms of action. Thus, the failure to appreciate the past may lead to the creation of new, ill-conceived rules, the imposition of the rulemaker's most current normative theories, or the rejection of process altogether. The failure to appreciate the cyclical nature of rule reform endangers the larger function of judicial institutions.

The failure to recognize the historical implications of broad, systemic notions of justice has been amply suggested by Professor Subrin's writing. Thus, Professor Subrin closes his article *How Equity Conquered Common Law* with the sobering observation that the conquest brought with it a steady erosion of formalism under the Federal Rules:

Our infatuation with equity has helped us to forget the historic purpose of adjudication. Courts exist not only to resolve disputes, but to resolve them in a way that takes law seriously by trying to apply legal principles to the events that brought the parties to court. The total victory of equity process has caused us to forget the essence of civil adjudication: enabling citizens to have their legitimate expectations and rights fulfilled. We are good at using equity process and thought to create new legal rights. We have, however, largely failed at defining rights and providing methods for their efficient vindication.¹⁰³

Thus, Professor Subrin's close examination of the past led him to conclude that today, perhaps more than ever, the equity-"engorged" system needs to revisit its companion common-law heritage:

The effort to defeat formalism so that society could move forward toward new ideas of social justice neglected the benefits of formalism once new rights had been created. The momentum toward case management, settlement, and alternative dispute resolution represents, for the most part, a continued failure to use predefined procedures in a manner that will try, however imperfectly, to deliver predefined law and rights.¹⁰⁴

99. See, e.g., Burbank, *supra* note 46.

100. See, e.g., Field, *supra* note 46 (Erie doctrine and federal common law); Transgrud, *supra* note 88 (history of pre-fourteenth amendment personal jurisdiction).

101. See Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718 (1975) (articulating the basic transsubstantive critique of the Federal Rules); cf. Hazard, *Forms of Action Under the Federal Rules of Civil Procedure*, 63 NOTRE DAME L. REV. 628 (1988) (discussing transsubstantive intent of the Federal Rules).

102. See Symposium: *The 50th Anniversary of the Federal Rules of Civil Procedure, 1938-1988*, 137 U. PA. L. REV. 1873 (1989) (papers delivered at Northeastern University School of Law, October 7-8, 1988).

103. Subrin, *How Equity Conquered Common Law*, *supra* note 41, at 1001.

104. *Id.* at 1001-02.

V. THE METAPROCEDURAL CHALLENGE TO HISTORY-BASED PROCEDURALISM

Finally, research into the history of procedure should help supply a response to the metaprocedural challenge and debate that has taken center stage in the discipline. The concept of metaprocedure, embodied in the Cover, Fiss, and Resnik text *Procedure*,¹⁰⁵ rejects the traditional rules-based proceduralism and legal-process theory that have guided procedural education for the past thirty-five years.¹⁰⁶ The exemplary casebook for traditionalists, the Field and Kaplan text, is now viewed as old-fashioned, pedantic, dated, and wrong-minded.¹⁰⁷ Professor Eskridge, a leading proponent of metaprocedure, has suggested that “[d]evelopments in legal theory and education have undermined the cogency”¹⁰⁸ of the ideas on which the Field and Kaplan text is premised; procedure teachers are increasingly restive with the Field and Kaplan approach.¹⁰⁹ The Cover, Fiss, and Resnik metaprocedural framework thus marks a radical departure from the traditional teaching strategy for civil procedure and its “most important decision is to focus on themes and structures of procedure, rather than the history and mechanics of doctrine.”¹¹⁰

In truth, the metaprocedural approach is totally ahistorical and non-doctrinal, a lacking that brings into question the validity of the entire intellectual endeavor. In a brief passage reminiscent of Professor Hazard’s observation that everyone pays ritual obeisance to the importance of history, even Professor Eskridge acknowledges that metaprocedure’s ahistoricism is a “fundamental problem.”¹¹¹ But for Professor Eskridge and the metaproceduralists, it is clearly not enough of a pedagogical problem to eviscerate the overarching concept. And the overarching concept of metaprocedure is to supplant traditional rules-proceduralism, or legal-process theory, with the lessons of normativism.¹¹²

Thus, the nub of metaprocedure is to evaluate procedure critically through the prism of substantive results. Explains Professor Eskridge:

The working assumption of the Cover, Fiss and Resnik book is not *proceduralism*, the notion that good procedures are presumptive evidence of good results, but is instead *normativism*, the notion that good results (substantive justice) are presumptive evidence of good procedures.

What troubles Cover, Fiss and Resnik about proceduralism is that its emphasis on process threatens to sanction unjust results and to submerge critical debate over substantive justice.¹¹³

In locating metaprocedure as a reaction to the 1950s legal-process school and the Field and Kaplan rules-formalism, Professor Eskridge makes a valuable contribution to legal history. But when he further lapses into unfortunate rhetoric that caricatures

105. COVER, FISS & RESNIK, *supra* note 9.

106. See Eskridge, *supra* note 51, at 947–48.

107. See *id.* at 947–51.

108. *Id.* at 948.

109. *Id.* at 950.

110. *Id.*

111. *Id.* at 954; see *supra* note 55.

112. Eskridge, *supra* note 51, at 964–73.

113. *Id.* at 964 (footnotes omitted).

traditional formalism as inducing, supporting, and committing crimes of procedural violence,¹¹⁴ even the most open-minded academic's radar should signal something very wrong, if not dangerous, in what the metaproceduralists are up to.

I have written elsewhere that metaprocedure is the lineal descendant of realism and realist curricula reform stemming back to the 1920s, and I have concluded that at worst it is ill-conceived and probably unteachable.¹¹⁵ But after reading Professor Eskridge's essay, I am now convinced that it is dangerous. I say this for a variety of reasons.

First, the metaproceduralists make no meaningful distinction between substance and procedure while concomitantly failing to make any persuasive argument that all procedure is, in reality, substantive. Surely there is some distinction,¹¹⁶ and it seems to me that if metaproceduralists want to stake their case on normativism, they are obliged, at a minimum, to carry the latter argument. Professor Eskridge cites, as his chief illustration of the so-called "violence of proceduralism," the lessons of *Brown v. Board of Education*,¹¹⁷ but this illustration so stretches and distorts any concept of procedure as to render the argument meaningless. The history of legal segregation is a problem of substantive justice; the metaproceduralists transform every incorrect substantive decision into a problem of defective process.

Second, metaprocedure's very ahistoricism undermines and invalidates the critical posture assumed by its followers, and in refusing to view problems in historical context, metaproceduralists are able to score quick and easy rhetorical victories. For example, when Professor Eskridge views *Brown v. Board of Education* out of historical context, he denies the doctrinal history that led to that decision, yet he would have us understand that *Brown* demonstrates the failure or violence of proceduralism. From the metaproceduralist perspective, only extrajudicial actions impelled the Court finally to capitulate to desegregation.¹¹⁸ This is one version of history; but doctrinal history also demonstrates that a long series of decisions had significantly eroded the separate-but-equal concept by the time the Court heard *Brown*. The doctrinal history demonstrates that the courts had come to recognize that

114. *See id.* at 965, 967. Also unfortunate is Professor Eskridge's repeated use of what he calls the "Hobbesian Paradigm" of adjudication to explain and distinguish the normativist approach to dispute resolution. *See id.* at 955-59, 961. Professor Eskridge means to describe a basically atomistic system, but his analogy to Hobbesian political theory (most remembered for its colorful statement concerning the nastiness, brutality, and brevity of life), though clever, is overwrought.

115. *See generally* Mullenix, *Metaprocedure*, *supra* note 7.

116. *See, e.g.,* Eskridge, *supra* note 51, at 967: "Cover, Fiss, and Resnik provide many more examples of supposedly neutral rules that are oppressive when viewed in social context, particularly in their violence to the poor, and of procedural cases where the real issues are those of substantive justice."

117. 347 U.S. 483 (1954) (discussed in Eskridge, *supra* note 51, at 965-67).

118. Eskridge, *supra* note 51, at 965, 973:

Hence, in a very real sense, adjudication was part of positive law's violence against black citizens. This state-sponsored violence was in no way ameliorated by its procedural regularity, and *Brown* teaches that meticulous procedures cannot validate morally squalid decisions.

... .

... What eliminated state-sanctioned segregation was not the Supreme Court, but an ongoing interpretive community (or perhaps several communities) of parents, civic activists, ministers, lawyers, academics, lobbyists, and journalists, who associated formally and informally to transform themselves and to transform the social and political world that was (and to a great extent remains) morally wrong.

separate is inherently unequal; but this chapter of legal history is missing from metaprocedure, perhaps because it does not dovetail nicely with the antiformalist thesis.

Third, and this is concededly a petulant objection, metaprocedure has developed its own obscurantist nomenclature that is variously offensive, elitist, and at bottom, ideological. The vocabulary of metaprocedure (morphogenesis, jurisgenesis, jurispathic, *nomos*)¹¹⁹ sets up good guys and bad guys in sophisticated terminology. Basically, the metaproceduralists are the good guys who care about marginalized persons and groups who are being violently assaulted (procedurally) by the bad guys, the Field and Kaplan, Hart and Wechsler, Hart and Saks traditional legal-process theorists. For a reformist movement bent on unmasking the ideological bases of formalism, the metaproceduralists ought to be more honest about their own intellectual agenda.

Fourth, evaluating procedure on the basis of normativism is absurd, presumptuous, and bound to fail. Professor Eskridge knows this;¹²⁰ he concedes that Professor Fiss revised his own normative views over the years and that the three coauthors each have different conceptions of normative philosophy.¹²¹ Thus, the three leading expositors of metaprocedure cannot offer a reasonable normative construct, and neither two thousand years of written history nor millions of philosophical words have produced a coherent, agreed-upon normative vision.

The failure to provide a normative vision is a serious defect because it reduces substantive justice to the personal perspective of the metaproceduralist, and in the judicial arena, to judicial tyranny.¹²² The problem is that if formalism inevitably results in substantive injustice, then no rules will remedy the problem, and rule reform is merely an exercise in futility. Furthermore, metaproceduralists cannot escape the faint odor of moral righteousness that permeates their charges of procedural violence. On balance, I would rather be assaulted by a proceduralist than by a normativist; in the former instance, I would at least have the consolation that the offense was not committed with a sense of moral rectitude. Yet that is precisely what the metaproceduralists would do; they justify normative violence based on the certitude of their superior knowledge of substantive justice.

Finally, metaprocedure is dangerous precisely because it is antiprocedure and teaches the wrong things; it is nihilistic in its antiformalism and provides no meaningful framework for students and future lawyers to think about positive law reform. As has been said more eloquently by others, law professors ought not to be in the business of teaching cynicism and disrespect for the law.¹²³ Yet metaprocedure,

119. See *id.* at 965, 970–71; see also *supra* note 114 (discussing the “Hobbesian Paradigm”).

120. See *id.* at 968–71.

121. *Id.* at 967–73.

122. “By making judges the arbiters of public values, Fiss’ system is open to charges of judicial tyranny.” *Id.* at 968.

123. See Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222 (1984); “*Of Law and the River*,” and *Of Nihilism and Academic Freedom*, 35 J. LEGAL EDUC. 1 (1985), a collection of correspondence commenting on the Carrington article, including the famous response by Professor Fiss:

Law schools are professional schools, inasmuch as they train people for a profession. But they are also academic

irresponsibly and unskillfully taught, will do just that; when the teacher wrenches procedure from history and charges it with substantive injustice, there is no reason to respect rules or to create new or different rules. With relativistic (or even worse, undefined) normativism as its central thesis, metaprocedure has created an impossible, if not destructive, task. The ultimate problem with metaprocedure—as long as normativism supplies the evaluative measure for justice—is that there can be no conceivable set of just rules.

VI. CONCLUSION

Since the publication of the Hazard study on the state of scholarship in civil procedure twenty-five years ago, much progress has been made in infusing a historical perspective into procedural scholarship. Many contemporary writers are developing themes exclusively in the study of the history of procedure, reclaiming aspects of rulemaking history, doctrinal development, or particular cases. However, much historical research still remains to be done across the broad spectrum of individual rules; almost all the procedural problems identified in the Hazard study¹²⁴ still have eluded careful historical analysis.

While individual scholars have been cultivating historical roots, the trend among casebook writers is to reduce inclusion of historical materials. Even for those problems that rely heavily on history for their solution, such as the right to a jury trial, the historical antecedents simply are disappearing from the casebooks. This gradual shrinking of descriptive materials on law and equity deprives students of a necessary context for apprehending not only civil procedure, but much of the substantive law encountered in the first year of law school. To the extent that casebooks have become increasingly ahistorical, this is a lamentable trend.

In general, legal scholarship has embraced the social sciences and, more recently, the humanities through reflections on legal themes in literature.¹²⁵ History and historians deserve a more thoughtful reception from proceduralists; students need this procedural past as a prologue to their future.

institutions, and by that I mean they seek to discover the truth. We cannot shut off an avenue of inquiry, for fear that it would render the professional training pointless—if the river does not exist, people should not be trained for river piloting, at least not in the way that they have been. Every law school should confront the question whether law exists, and it is of the essence of academic freedom to allow all sides to speak, even those who would answer that question in the negative and thus recommend that our doors be closed and resources be used for other purposes.

Id. at 24.

124. See *supra* note 40.

125. See, e.g., R. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* (1988).